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## Administrative Law - Freedom of Information Act - Exemption 5 Includes a Qualified Privilege for Confidential Commercial Information

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## Recent Developments

### ADMINISTRATIVE LAW — FREEDOM OF INFORMATION ACT — EXEMPTION 5 INCLUDES A QUALIFIED PRIVILEGE FOR CONFIDENTIAL COMMERCIAL INFORMATION.

#### *Federal Open Market Committee v. Merrill* (U.S. 1979)

The Federal Open Market Committee (FOMC),<sup>1</sup> which has exclusive control over the open market operations<sup>2</sup> of the Federal Reserve System,<sup>3</sup> issues monthly Domestic Policy Directives<sup>4</sup> which summarize the FOMC's deliberations and provide guidelines for the growth of the nation's money supply and for the federal funds rate.<sup>5</sup> In 1975, David Merrill, acting under the Freedom of Information Act (FOIA),<sup>6</sup> requested disclosure of, among

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1. The FOMC consists of the seven members of the Board of Governors of the Federal Reserve System and five representatives of the Federal Reserve Banks. *See* 12 U.S.C. § 263(a) (1976). For an explanation of the Federal Reserve System, *see* note 3 *infra*.

2. Federal Open Mkt. Comm. v. Merrill, 99 S. Ct. 2800, 2804 (1979). Open market operations involve the purchases and sales of government securities in the domestic securities market. *Id.* Through open market operations, the FOMC influences the expansion or contraction of the nation's money markets. *Id.* at 2803-05.

3. *Id.* at 2804. The Federal Reserve System consists of individual member banks, district Federal Reserve Banks, the Federal Open Market Committee, and the Board of Governors. *See* BOARD OF GOVERNORS OF THE FEDERAL RESERVE BOARD, THE FEDERAL RESERVE SYSTEM, PURPOSES AND FUNCTIONS 13 (1974). The principal purpose of the Federal Reserve System is to regulate the flow of credit and money in order to foster orderly economic growth. *Id.* at 1-2.

4. 99 S. Ct. at 2804. The Domestic Policy Directives indicate whether the monetary policy for the future month will be expansionary, deflationary, or unchanged. *Id.* The Directives include both factual data and supporting material, and have recently contained specific tolerance ranges for the growth in the nation's money supply and federal funds rate. *Id.* at 2804-05 & n.5. The Domestic Policy Directives are immediately provided to the account manager of the System Open Market Account, a combined investment pool of all Federal Reserve Banks, in order to guide him in the actual implementation of the FOMC's policy through open market operation. *Id.* at 2804, 2805.

The Directives are subsequently incorporated in a document called the Record of Policy Actions, which also includes other policy statements, and an explanation of the rationale for the committee's actions and the votes of its members. *Merrill v. Federal Open Mkt. Comm.*, 413 F. Supp. 494, 499-500 (D.D.C. 1976), *aff'd*, 565 F.2d 778 (D.C. Cir. 1977), *vacated and remanded*, 99 S. Ct. 2800 (1979). The minutes of the FOMC's monthly meetings are embodied in Memoranda of Discussion. 413 F. Supp. at 500.

5. 99 S. Ct. at 2804 & n.5. "The federal funds rate is the rate at which commercial banks are willing to lend or borrow immediately available reserves on an overnight basis." *Id.* (citation omitted).

6. 5 U.S.C. § 552 (1976), *as amended by* Act of Oct. 13, 1978, Pub. L. No. 95-454, tit. IX, § 906(a)(10), 92 Stat. 1225. The relevant disclosure provisions of the FOIA provide in pertinent part:

(a) Each agency shall make available to the public, information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public —

...  
(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; ...

other things, the FOMC's *current* Domestic Policy Directives.<sup>7</sup> The FOMC refused Merrill's request,<sup>8</sup> citing the FOMC's disclosure regulations which permit public release of the Domestic Policy Directives only after they expire.<sup>9</sup>

5 U.S.C. § 552(a) (1976). For a discussion of the history and purposes of the FOIA, see notes 17-23 and accompanying text *infra*.

7. 99 S. Ct. at 2806. Merrill was a student at Georgetown University Law Center and a member of the school's Institute for Public Interest Representation. *Id.* at 2805-06. Professing a strong interest in administrative law and a desire to study the process by which the Federal Open Market Committee regulates the national money supply, Merrill, in March, 1975, requested the FOMC's Records of Policy Actions for its January and February meetings of 1975, including the Domestic Policy Directives, and the Memoranda of Discussion pertaining to those meetings. See 413 F. Supp. at 498. For an explanation of the Domestic Policy Directives and the Memoranda of Discussion, see note 4 *supra*.

8. 99 S. Ct. at 2806. The FOMC's denial of the request for *current* Domestic Policy Directives was implicit in its refusal of the plaintiff's request for disclosure of the Records of Policy Actions, since the Domestic Policy Directives are included in those documents. 413 F. Supp. at 500. See note 4 *supra*. In the district court, the FOMC maintained that such documents were exempt from disclosure under exemption 5 of the FOIA. 413 F. Supp. at 502. See note 11 and accompanying text *infra*.

Plaintiff's request for the Memoranda of Discussion, which were customarily released to the public approximately five years following the relevant meeting, was also denied by the FOMC. 413 F. Supp. at 499-500. Although the denial was not authorized by regulation, the FOMC contended that these documents also fit within exemption 5 of the FOIA. *Id.* at 499. For a discussion of this exemption, see notes 11 & 24-47 and accompanying text *infra*.

9. 99 S. Ct. at 2806. See 12 C.F.R. § 271.5 (1978). The regulation relied upon by the FOMC provides:

(a) *Deferred availability of information.* In some instances, certain types of information of the Committee are not published in the FEDERAL REGISTER or made available for public inspection or copying until after such period of time as the Committee may determine to be reasonably necessary to avoid the effects described in paragraph (b) of this section or as may otherwise be necessary to prevent impairment of the effective discharge of the Committee's statutory responsibilities.

(b) *Reasons for deferment of availability.* Publication of, or access to, certain information of the Committee may be deferred because earlier disclosure of such information would:

- (1) Interfere with the orderly execution of policies adopted by the Committee in the performance of its statutory functions;
  - (2) Permit speculators and others to gain unfair profits or to obtain unfair advantages by speculative trading in securities, foreign exchange, or otherwise;
  - (3) Result in unnecessary or unwarranted disturbances in the securities market;
  - (4) Make open market operations more costly;
  - (5) Interfere with the orderly execution of the objectives or policies of other Government agencies concerned with domestic or foreign economic or fiscal matters;
- or
- (6) Interfere with, or impair the effectiveness of, financial transactions with foreign banks, bankers, or countries that may influence the flow of gold and of dollar balances to or from foreign countries.

*Id.*

At the time of plaintiff's initial request, the Domestic Policy Directives first had to be incorporated into the Record of Policy Actions at the FOMC's subsequent monthly meeting, and then published in the *Federal Register* 90 days after that meeting. 413 F. Supp. at 499-500. See 32 Fed. Reg. 9,518, 9,519 (1967). The 90-day period was later amended to 45 days. 40 Fed. Reg. 13,204 (1975). This amendment became effective after Merrill's initial request for disclosure and was operative during the FOMC's consideration of his request. 413 F. Supp. at 499. A 1976 amendment changed the delay period for the publication of Records of Policy Actions from 45 days to "a few days after the next regularly scheduled meeting." 41 Fed. Reg. 22,261 (1976).

Merrill then filed suit in the United States District Court for the District of Columbia, requesting declaratory and injunctive relief against the operation of the FOMC disclosure regulation.<sup>10</sup> Rejecting the FOMC's argument that the documents were exempt from disclosure by exemption 5 of the FOIA,<sup>11</sup> the district court granted summary judgment for the plaintiff<sup>12</sup> and ordered the publication of the current Domestic Policy Directives in the *Federal Register*.<sup>13</sup> The United States Court of Appeals for the District of

The FOMC promulgated this amendment after the district court entered judgment for the plaintiff. 565 F.2d at 782. *See* note 13 *infra*. However, even the amended regulation effectively bars release of *current* Domestic Policy Directives, since they become inoperative after the next monthly meeting. 99 S. Ct. at 2805.

When plaintiff requested a reconsideration of the FOMC's administrative determination, Governor Robert C. Holland, a member of the Board of Governors of the Federal Reserve Board, released the Records of Policy Actions. 413 F. Supp. at 499. However, the 45-day delay period from the day of adoption had already elapsed; thus, the Domestic Policy Directives contained in the Records no longer represented the *current* and effective policy of the FOMC. *Id.* Governor Holland also denied the plaintiff's request for the Memoranda of Discussion on the ground that they were exempt under exemption 5 of the FOIA. *Id.* *See* note 8 *supra*. For a discussion of the trial court's adjudication of plaintiff's request for the Records of Policy Actions and Memoranda of Discussion, *see* note 13 *infra*.

10. 413 F. Supp. at 499. Plaintiff's suit was authorized by subsection (a)(4)(B) of the FOIA, which provides:

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter *de novo*, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

5 U.S.C. § 552(a)(4)(B) (1976).

11. 413 F. Supp. at 503. Exemption 5 of the FOIA exempts from the general disclosure provision matters that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (1976). The FOMC argued that the Records of Policy Actions were exempt under the "predecisional" privilege of exemption 5. 413 F. Supp. at 502. *See* notes 31-37 and accompanying text *infra*.

The FOMC also contended that its Records of Policy Actions were protected under exemption 2, which applies to intra-agency personnel rules and practices. 413 F. Supp. at 502. *See* 5 U.S.C. § 552(b)(2) (1976); note 22 *infra*. The district court held that this exemption was not applicable because the Records of Policy Actions were not "house-keeping" matters dealing with internal personnel rules and practices. 413 F. Supp. at 502.

12. 413 F. Supp. at 507.

13. 413 F. Supp. at 506. The district court found the Domestic Policy Directives to be within the disclosure requirement for statements of general policy under subsection (a)(1)(D) of the FOIA. *Id.* For the text of subsection (a)(1)(D), *see* note 6 *supra*. The court also found that the remaining Records of Policy Actions were subject to disclosure upon their adoption at the subsequent FOMC meeting. 413 F. Supp. at 506. In passing on the plaintiff's request for the FOMC Memoranda of Discussion, the court ruled that the "reasonably segregable factual portions" of the memoranda were subject to prompt disclosure. *Id.* at 507.

Subsequent to the entering of the district court's order and prior to the proceedings in the court of appeals, the FOMC amended its deferred disclosure policy for the Records of Policy Actions from a 45-day delay to availability "within a few days" after the subsequent FOMC meeting. 41 Fed. Reg. 22,261 (1976). *See* note 9 *supra*. Since a Record of Policy Actions is not actually adopted until it is reviewed by the members of the FOMC and approved at their next monthly meeting, the plaintiff conceded that the new procedure complied with the court's order

Columbia Circuit affirmed,<sup>14</sup> refusing to find any privilege for confidential commercial information in exemption 5.<sup>15</sup> On writ of certiorari,<sup>16</sup> the United States Supreme Court vacated and remanded, *holding* that the Domestic Policy Directives might be protected under an exemption 5 qualified privilege for confidential commercial information generated by the government in the process leading up to the award of a contract. *Federal Open Market Committee v. Merrill*, 99 S. Ct. 2800 (1979).

In 1966, Congress enacted the Freedom of Information Act<sup>17</sup> in hopes of curing the deficiencies in the provisions of the Administrative Procedure Act concerning public disclosure of agency information.<sup>18</sup> The recognized

and, thus, disclosure of the Records of Policy Actions was not at issue in the appellate proceedings. *See* 565 F.2d at 782. The amendment to the regulations did not, however, resolve the issue of the Domestic Policy Directives, because the district court had ordered separate and immediate disclosure of the current Directives promptly after the meeting at which they are formulated. *Id.*

The parties also agreed that the factual portions of the Memoranda of Discussions would be produced pursuant to the district court's order. *See* 99 S. Ct. at 2806 n.8. Therefore, the only documents at issue in the court of appeals were the current Domestic Policy Directives. 565 F.2d at 782.

14. *Merrill v. Federal Open Mkt. Comm.*, 565 F.2d 778 (D.C. Cir. 1977), *vacated and remanded*, 99 S. Ct. 2800 (1979).

15. 565 F.2d at 783-87. The court's resistance to an expansive interpretation of exemption 5 is reflected in the following passage:

In view of our mandate to implement the Act's "general philosophy of full agency disclosure unless information is exempt under clearly delineated statutory language," . . . we decline to create, by rough analogy, a privilege not in existence at the time FOIA was enacted, and then incorporate this privilege into an exception to the overriding command of that Act.

*Id.* at 787, *quoting* S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965). The court of appeals also rejected the FOMC's argument that the Domestic Policy Directives were "predecisional" and, thus, within exemption 5. 565 F.2d at 783. For a discussion of the "predecisional" privilege under exemption 5, *see* notes 31-37 and accompanying text *infra*. The FOMC argued that its policy is not actually adopted until the account manager buys and sells securities in the open market and that the Directives were thus not final decisions. *Id.* The court of appeals concluded that the exercise of some discretion on the part of the account manager did not undermine the fact that the Directives represent the policy decisions of the FOMC. *Id.* The court contended that a finding that the Directives were not final decisions would "balloon the boundaries of the privilege for deliberative memoranda far beyond its purposes." *Id.* For a general discussion of exemption 5, *see* notes 24-47 and accompanying text *infra*.

16. 436 U.S. 917 (1978). The Supreme Court granted certiorari on the strength of the FOMC's representations that the rulings in the courts below could seriously interfere with the implementation of national monetary policy. 99 S. Ct. at 2803.

17. Pub. L. No. 89-487, 80 Stat. 250 (1966) (current version at 5 U.S.C. § 552 (1976)), as amended by Act of Oct. 13, 1978, Pub. L. No. 95-454, tit. IX, § 906(a)(10), 92 Stat. 1225.

18. S. REP. NO. 813, 89th Cong., 1st Sess. 5 (1965) [hereinafter cited as S. REP. NO. 813]. *See* Administrative Procedure Act, ch. 324, § 3, 60 Stat. 238 (1946) (current version at 5 U.S.C. § 552 (1976)). The four major shortcomings of the disclosure provisions of the Administrative Procedure Act were described by the Senate Committee on the Judiciary as follows: 1) its failure to delimit the exception for nondisclosure of matters "in the public interest"; 2) its broad exception for documents required to be held confidential for good cause; 3) its requirement that only persons "properly and directly concerned" could have access to information; and 4) its failure to provide a remedy in case of wrongful withholding of information by government officials. S. REP. NO. 813, *supra*, at 5. *See also* H.R. REP. NO. 1497, 89th Cong., 2d Sess. 4-6, reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2418, 2422-23 [hereinafter cited as H.R. REP. NO. 1497] (Administrative Procedure Act had been used as an authority for withholding rather than disclosing information).

legislative purpose of the FOIA was "to establish a general philosophy of full agency disclosure unless information is exempted under *clearly delineated statutory language*."<sup>19</sup> To effectuate this goal, the FOIA provides various modes of disclosure for several classes of government documents,<sup>20</sup> including current publication in the *Federal Register* of an agency's "statements of general policy."<sup>21</sup> Recognizing the necessity for protecting some agency information, Congress included nine exemptions,<sup>22</sup> the fifth of which excludes from the general disclosure provisions "inter-agency or intra-agency

19. S. REP. NO. 813, *supra* note 18, at 3 (emphasis added). See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975). For analysis of the legislative history and purposes of the FOIA, see K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 5:1-4 (2d ed. 1978); Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967).

20. See 5 U.S.C. § 552(a) (1976). Subsection (a)(1) lists the information which must be currently published in the *Federal Register*. *Id.* § 552(a)(1). Subsection (a)(2) lists the information which is to be made available for public inspection and copying. *Id.* § 552(a)(2).

21. *Id.* § 552(a)(1)(D). For text of this section, see note 6 *supra*. Subsection (a)(2)(B) provides that "those statements of policy and interpretations which have been adopted by the agency and are not published in the *Federal Register*" shall be available for public inspection. 5 U.S.C. § 552(a)(2)(B) (1976).

22. See 5 U.S.C. §§ 552(b)(1)-(9) (1976). The general disclosure section of FOIA does not apply to matters that are

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, . . . [in certain limited instances of a criminal or national security investigation], confidential information furnished by a confidential source, (E) disclose investigative techniques and procedure, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) geological and geophysical information and data, including maps, concerning wells.

*Id.* (emphasis added). See generally Singleton & Hunter, *Statutory and Judicial Responses to the Problem of Access to Government Information*, 1979 DET. C.L. REV. 51; Note, *The Freedom of Information Act—The Parameters of the Exemptions*, 62 GEO. L.J. 177 (1973); Comment, *The Freedom of Information Act: A Survey of Litigation Under the Exemptions*, 48 MISS. L.J. 784 (1977); Comment, *Access to Information? Exemptions From Disclosure Under the Freedom of Information Act and the Privacy Act of 1974*, 13 WILLAMETTE L.J. 135 (1976). For an extensive guide to the litigation and to the legal commentary concerning the FOIA, see U.S. DEPT OF JUSTICE, FREEDOM OF INFORMATION CASE LIST (1979).

memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."<sup>23</sup>

The courts' analytical approach to exemption 5 has focused, first, on whether the documents at issue qualify as inter-agency or intra-agency memoranda,<sup>24</sup> and, second, on whether privileges applicable to such documents in a civil discovery context were intended to be recognized within exemption 5.<sup>25</sup> Thus, in applying the first prong of this analysis, the court in *American Mail Lines, Ltd. v. Gulick*<sup>26</sup> ruled that because an internal memorandum had been publicly cited by an agency as the sole basis for the agency's action, it thereby lost its intra-agency status and became a public record outside the protection of exemption 5.<sup>27</sup>

Litigation concerning exemption 5 has, however, centered primarily on the second prong — i.e., the question of which civil discovery privileges normally available to an agency in private litigation are applicable in exemption 5 cases.<sup>28</sup> In deciding this issue, courts have generally kept in view both the FOIA's philosophy of broad disclosure of agency information<sup>29</sup> and Congress' concern for the continued "full and frank exchange of ideas" within an agency.<sup>30</sup>

In *EPA v. Mink*,<sup>31</sup> the Supreme Court noted that the civil discovery rules could only be applied to exemption 5 by way of rough analogies.<sup>32</sup> In *Mink*, the Environmental Protection Agency (EPA) had refused a request under the FOIA for disclosure of documents containing the EPA's recommendations to the President concerning underground nuclear testing programs.<sup>33</sup> The Court acknowledged the general civil discovery privilege for

23. 5 U.S.C. § 552(b)(5) (1976). See note 22 *supra*. See generally Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 HARV. L. REV. 1047 (1973); Comment, *The Freedom of Information Act and Its Internal Memoranda Exemption: Time For a Practical Approach*, 27 SW. L.J. 806 (1973).

24. See, e.g., *EPA v. Mink*, 410 U.S. 73, 85 (1973); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 158 (1975). See also notes 26-27 and accompanying text *infra*.

25. See notes 28-47 and accompanying text *infra*.

26. 411 F.2d 696 (D.C. Cir. 1969).

27. *Id.* at 698, 703. The court in *Gulick* required the Maritime Subsidy Board to release an internal memorandum which the Board acknowledged to be the basis of its ordering a refund of subsidy payments from American Mail Line, Ltd. *Id.*

28. See notes 31-47 and accompanying text *infra*.

29. See note 19 and accompanying text *supra*.

30. H.R. REP. NO. 1497, *supra* note 18, at 10. See S. REP. NO. 813, *supra* note 18, at 9. See also *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970) (purely factual reports and scientific data in FTC rulemaking proceedings must be disclosed); *American Mail Lines, Ltd. v. Gulick*, 411 F.2d 696, 703 & n.13 (D.C. Cir. 1969) (internal memorandum, publicly cited by agency as the sole basis for agency decision, is a public record).

31. 410 U.S. 73 (1973).

32. *Id.* at 86. The Court noted that although the language of exemption 5 clearly contemplated that the public would be entitled to all documents which a private party could discover in litigation with an agency, the rules governing such discovery have always been uncertain. *Id.*

33. *Id.* at 75. Congresswoman Patsy Mink had requested the release of the agency documents, which contained conflicting recommendations concerning the advisability of underground nuclear testing. *Id.* The EPA denied the request, arguing that the documents were exempt

"confidential intra-agency advisory opinions"<sup>34</sup> and found that the legislative history of the FOIA demonstrated that Congress intended to include this privilege in exemption 5.<sup>35</sup> While recognizing that the EPA's advisory recommendations were, thus, privileged and exempt from disclosure, the Court emphasized that, as in the general civil discovery context, this "pre-decisional" privilege would be applicable only insofar as necessary to protect the deliberative or consultative function of agency decisionmaking.<sup>36</sup> Therefore, the Court concluded that exemption 5 did not protect purely factual material in deliberate memoranda which was severable from the privileged parts of the documents.<sup>37</sup>

Exemption 5's privileges were further defined by the Supreme Court in *NLRB v. Sears, Roebuck & Co.*,<sup>38</sup> where the Court determined that the attorney work-product privilege recognized in the civil discovery context also extended to exemption 5.<sup>39</sup> The plaintiff in *Sears* sought disclosure of the "advice and appeals memoranda" of the General Counsel of the National Labor Relations Board (NLRB).<sup>40</sup> These memoranda reflected administrative decisions to file or dismiss unfair labor practice complaints.<sup>41</sup> The Court found that the memoranda pertaining to the NLRB's issuance of a complaint were privileged in civil litigation, and exempt under FOIA, since

from disclosure under exemptions 1 and 5 of the FOIA. *Id.* See 5 U.S.C. § 552(b)(1), (5) (1976); note 22 *supra*. The Supreme Court sustained the EPA's argument that documents specifically classified "top secret" by executive order were within the protection of exemption 1. 410 U.S. at 75-84.

34. *Id.* at 86, quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958). In *Kaiser Aluminum*, the Court of Claims denied an aluminum company access to the government records of a proposed contract between the government and Kaiser because the records were advisory. 157 F. Supp. at 946. The court explained that the privilege arose from the policy of promoting open and frank discussion in administrative decisionmaking. *Id.*

35. 410 U.S. at 87. The Court relied on congressional language which stated:

It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to operate in a fishbowl.

*Id.*, quoting S. REP. NO. 813, *supra* note 18, at 9.

36. 410 U.S. at 87-91.

37. *Id.* at 91.

38. 421 U.S. 132 (1975).

39. *Id.* at 154.

40. *Id.* at 136. Pursuant to the procedure of the NLRB, when a private party files an unfair labor practice charge, the General Counsel issues an "Advice Memorandum" to a regional director presenting the General Counsel's determination of whether the NLRB should file a complaint or dismiss charges. *Id.* at 132-42. If the Board decides against filing a complaint, the private party may appeal to the General Counsel, who, upon further consideration, issues an "Appeals Memorandum" which is binding on the NLRB. *Id.* *Sears* sought the memoranda issued within five years on the subject of employer withdrawal from multi-employer bargaining and related labor relations issues. *Id.* at 142-43. The NLRB refused disclosure, arguing that the memoranda were not final decisions and were exempt under exemptions 5 and 7, since they were both predecisional and investigative. *Id.* at 143-44.

41. See note 40 *supra*.



they were prepared by an attorney in contemplation of litigation.<sup>42</sup> In reaching this conclusion, the Court noted that the legislative history of FOIA expressly envisioned that the attorney work-product privilege would be recognized under exemption 5.<sup>43</sup> Turning to the memoranda which explained the NLRB's dismissal of complaints, the Court found that these memoranda were final agency decisions which must be disclosed.<sup>44</sup> The Court explained that the protective "predecisional" privilege recognized in *Mink* was inapplicable,<sup>45</sup> noting that since the quality of a decision could only be affected prior to the time the decision is made,<sup>46</sup> the disclosure of these memoranda explaining final decisions would not intrude on the predecisional process.<sup>47</sup>

Against this background the *Merrill* Court<sup>48</sup> began its analysis by determining that the FOMC's Domestic Policy Directives were inter-agency or intra-agency memoranda within the meaning of exemption 5.<sup>49</sup> The Court

42. 421 U.S. at 160. The Court did not clearly indicate the scope of the privilege, stating only that "[w]hatever the outer boundaries of the attorney's work-product rule are, the rule clearly applies to memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy." 421 U.S. at 154 (citations omitted). In a subsequent decision, Justice Powell suggested that the entire work-product privilege was not meant to be incorporated into exemption 5, but rather, it is the predecisional characteristic of the privilege which is involved. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 254 n.12 (1978) (Powell, J., concurring in part and dissenting in part).

In *Mead Data Cent., Inc. v. United States Dep't of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977), the court of appeals relied upon *Sears* in recognizing a general attorney-client privilege within exemption 5. *Id.* at 252-53 & n.20. For criticism of the *Mead* court's extension of *Sears*, see Comment, *Mead Data Central, Inc. v. United States Department of the Air Force: Extending the FOIA's 5th Exemption*, 19 WM. & MARY L. REV. 343, 356-58 (1977).

43. 421 U.S. at 154, 160. The *Sears* Court relied on language in the Senate Report which provided that exemption 5 "would include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties." *Id.* at 154, quoting S. REP. NO. 813, *supra* note 18, at 2.

44. 421 U.S. at 151-55. The *Sears* Court concluded that the provisions of the FOIA supported the distinction between predecisional communications and final opinions because the Act's affirmative disclosure requirements specifically referred to "final opinions" and "statements of policy and interpretations which have been adopted by the agency." *Id.* at 153, quoting 5 U.S.C. § 552(a)(2)(A), (B) (1976). The Court commented:

We should be reluctant, therefore, to construe Exemption 5 to apply to the documents described in 5 U.S.C. § 552(a)(2) [defining which documents shall be made available for public inspection and copying]; and with respect at least to "final opinions," which not only invariably explain agency action already taken or an agency decision already made, but also constitute "final dispositions" of matters by an agency, . . . we hold that Exemption 5 can never apply.

421 U.S. at 153-54 (footnote omitted).

The distinction between final opinions and predecisional communications was reasserted in the companion case to *Sears*, *Renegotiation Bd. v. Grumman Aircraft Eng'r Co.*, 421 U.S. 168 (1975). In *Grumman*, the Court held that since only the full Renegotiation Board had power to determine the existence of excessive profits on government contracts, the Board's regional and division reports concerning excessive profits were predecisional and, therefore, privileged from disclosure. *Id.* at 187-90.

45. 421 U.S. at 150-55. For a discussion of the "predecisional" privilege recognized by the *Mink* Court, see notes 34-36 and accompanying text *supra*.

46. 421 U.S. at 151.

47. *Id.* at 155.

48. Chief Justice Burger and Justices Brennan, White, Marshall, Blackmun, Powell, and Rehnquist composed the majority. 99 S. Ct. at 2803, 2814.

49. *Id.* at 2808. See notes 24-27 and accompanying text *supra*.

then considered the FOMC's principal contention that exemption 5 confers on agencies the general authority to delay disclosure of memoranda if the immediate release of the documents would undermine the effectiveness of agency policy.<sup>50</sup> After finding that no such general privilege existed in the civil discovery context, the Court concluded that the privilege could not be found within exemption 5.<sup>51</sup> The majority also observed that recognition of such a broad privilege would undermine the FOIA's basic principle of full disclosure.<sup>52</sup>

Turning to what it considered the "most plausible" of the FOMC's arguments,<sup>53</sup> the Court considered whether exemption 5 includes a privilege based on rule 26(c)(7) of the Federal Rules of Civil Procedure,<sup>54</sup> which empowers a court to order "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way."<sup>55</sup> The Court acknowledged that a privilege for

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50. 99 S. Ct. at 2809. The FOMC suggested that such authority existed even if the documents could be routinely discovered. *Id.*

51. *Id.*

52. *Id.* The Court noted that such an interpretation of exemption 5 would permit an agency to withhold information whenever it concluded that the efficiency of its operations or the public interest would not be promoted by the disclosure. *Id.* The Court stressed that Congress had repeatedly rejected the incorporation of such a vague "public interest" standard into exemptions under the FOIA. *Id.*, citing H.R. REP. NO. 1497, *supra* note 18, at 5, 9; S. REP. NO. 813, *supra* note 18, at 3, 5, 8. See also *EPA v. Mink*, 410 U.S. at 79-80.

53. 99 S. Ct. at 2810. The FOMC had also asserted that exemption 5 includes: 1) a privilege for "official government information" if disclosure of the information would harm the public interest; and 2) a privilege based on rule 26(c)(2) of the Federal Rules of Civil Procedure, which permits discovery only on specified terms. *Id.* at 2810 n.17. Neither of these arguments was considered by the Court. *Id.* The FOMC did not argue that the Directives were protected by the predecisional privilege, as it had done in the court of appeals. *Id.* at 2809 n.14.

54. 99 S. Ct. at 2810. See FED. R. CIV. P. 26(c)(7). In considering whether rule 26(c)(7) was within exemption 5, the Court noted:

We hesitate to construe Exemption 5 to incorporate a civil discovery privilege that would substantially duplicate another exemption. Given that Congress specifically recognized that certain discovery privileges were incorporated into Exemption 5, and dealt with other civil discovery privileges in exemptions other than Exemption 5, a claim that a privilege other than [predecisional] privilege or the attorney privilege is covered by Exemption 5 must be viewed with caution.

99 S. Ct. at 2810.

55. FED. R. CIV. P. 26(c)(7). While rule 26 generally deals with civil discovery, rule 26(c) describes the grounds upon which courts may protect information from discovery. See generally 4 MOORE'S FEDERAL PRACTICE ¶ 26.61(2), at 263 (2d ed. 1976).

The *Merrill* Court acknowledged that a qualified evidentiary privilege for trade secrets and other confidential commercial information had been recognized by the federal courts. 99 S. Ct. at 2810. See *E.I. du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 103 (1917) (where a secret process is alleged, in camera treatment of the evidence is appropriate). The Court also noted that the Federal Rules of Civil Procedure were applicable to the United States as a party. See 99 S. Ct. at 2810, citing *inter alia* *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958). Finally, the majority noted that during civil cases the government should be able to obtain a protective order under rule 26(c)(7). 99 S. Ct. 2810 & n.19, citing *Menominee Eng'r Corp. v. United States*, 20 Fed. Rules Serv. 2d 894 (Ct. Cl. 1975); *Consolidated Box Co. v. United States*, 18 Fed. Rules Serv. 2d 115 (Ct. Cl. 1973). In *Consolidated Box*, the Court of Claims ruled that data concerning excessive profit determinations of the Renegotiation Board was discoverable by a party in litigation with the Board, but, pursuant to rule 71(f) of the Court of Claims, disclosure would only be made to the plaintiff's attorney. *Id.* at 121.

"confidential . . . commercial information" did not enjoy unequivocal support in the FOIA's legislative history as did the predecisional and the attorney work-product privileges.<sup>56</sup> Nevertheless, the majority focused on language of the House Report which provided that "a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated *before it completes the process of awarding a contract* or issuing an order, decision or regulation."<sup>57</sup> The Court reasoned that this language reflected the concern for the confidentiality of commercial information expressed by various federal agencies during congressional hearings,<sup>58</sup> and concluded that exemption 5 includes a qualified privilege for confidential commercial information generated by the government in the process leading up to awarding a contract.<sup>59</sup> The Court explained that the purpose of this privilege was to preclude placing the government at a competitive disadvantage or endangering the consummation of government contracts.<sup>60</sup>

The Court found that the FOMC's Domestic Policy Directives might fall within the scope of this newly recognized privilege since they are substantially similar to confidential commercial information generated in the process of awarding a contract.<sup>61</sup> The majority reasoned that the Directives were "surely confidential" while operative, and commercial in nature, because they related to buying and selling securities.<sup>62</sup> The majority observed, however, that the privilege for confidential commercial information in rule 26(c)(7), like most discovery privileges, was not absolute but predi-

56. 99 S. Ct. at 2810-11. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 154, *EPA v. Mink*, 410 U.S. at 86; notes 31-47 and accompanying text *supra*.

57. 99 S. Ct. at 2812, quoting H.R. REP. NO. 1497, *supra* note 18, at 10 (emphasis supplied by the Court).

58. *Id.* at 2811 & nn.20 & 21. The Court examined the testimony of various agencies, including that of the Acting General Counsel of the Department of the Treasury, who specifically expressed concern that premature disclosure of the planned monetary policy of the Federal Reserve System would have "serious effects on the orderly handling of the Government's financing requirements." *Id.* at 2811 n.21, quoting H.R. REP. NO. 5012, 89th Cong., 1st Sess. 49 (1965). For a discussion of the Court's inference that exemption 5 incorporated protection for these concerns, see notes 74-83 and accompanying text *infra*.

59. 99 S. Ct. at 2812.

60. *Id.* The Court compared this privilege for commercial information with the predecisional privilege recognized in *Mink*. *Id.* See notes 34-37 and accompanying text *supra*. The Court stressed that documents shielded by the predecisional privilege remain privileged even after the agency decision is made, since disclosure would inhibit the free flow of advice and opinions in an agency. 99 S. Ct. at 2812. By contrast, the majority found that the rationale for protecting confidential commercial information generated in the process of awarding a contract expires upon the award of the contract or withdrawal of the offer. *Id.* See notes 84-87 and accompanying text *infra*. The majority further noted that this limited exemption 5 privilege did not substantially duplicate exemption 4, which applies to commercial information obtained from a person outside the government. 99 S. Ct. at 2812. See 5 U.S.C. § 552(b)(4) (1976). For the text of exemption 4, see note 22 *supra*.

61. 99 S. Ct. at 2813.

62. *Id.* The Court suggested that since the Domestic Policy Directives provide direction for the government's purchases and sales of securities, they could be seen as the government's buy-sell order to its broker. *Id.* For a description of the Directives, see note 4 *supra*.

cated on a balancing of the agency's interest in privacy against the need for disclosure.<sup>63</sup> The Court, while recognizing that the FOIA precludes consideration of the applicant's need,<sup>64</sup> concluded that the agency's interests may nevertheless be considered, and stated that a delay in disclosure of the Directives was permissible if their immediate release would significantly harm the government's monetary functions.<sup>65</sup> The Court, therefore, remanded the case to the district court for a determination of the impact that immediate disclosure of the Directives would have on the FOMC.<sup>66</sup>

In a strong dissent, Justice Stevens<sup>67</sup> criticized the majority's decision to permit temporary suppression of the Directives, pointing out that the FOIA explicitly provided for only current release or total exemption.<sup>68</sup> The dissent also disagreed with the majority's analogy of the FOMC's Directives to memoranda generated in the process of awarding a contract,<sup>69</sup> contending that the government's procurement negotiations were clearly distinct from its regulation of financial markets.<sup>70</sup> The dissent concluded that exemption 5 was inapplicable and that the majority's inclusion of a commercial privilege in that exemption lacked the support of the legislative history of the

63. 99 S. Ct. at 2813. The Court recognized that orders under rule 26(c)(7) forbidding *any* disclosure of trade secrets or confidential commercial information are rare, and that protective orders limiting disclosure to counsel or parties are usually entered. *Id.* at 2813 n.24. *See, e.g.*, *Chesa Int'l, Ltd. v. Fashion Assoc., Inc.*, 425 F. Supp. 234, 237 (S.D.N.Y. 1977) (order to produce names of customers included protective provision that the data would be for the use of plaintiff's attorneys only).

64. 99 S. Ct. at 2813. *See* *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 149 n.16; *EPA v. Mink*, 410 U.S. at 86.

65. 99 S. Ct. at 2814. The FOMC argued that prompt disclosure of the Directives would interfere with orderly policy execution and give unfair advantage to large investors. *Id.* at 2806, 2814. The FOMC additionally contended that immediate release of the Directives would lead to the imposition of substantial borrowing costs on the United States Treasury. *Id.* at 2814 & n.25. The Court concluded that if the FOMC could prove these allegations, "a slight delay in the publication of the Directives, such as that authorized by 12 CFR § 271.5, would be permitted under Exemption 5." 99 S. Ct. at 2814. For the text of this regulation, *see* note 9 *supra*.

66. 99 S. Ct. at 2814. The Court noted that the lower courts had not heard arguments on this issue, and remanded the case to the district court for determination of whether, or to what extent, the Domestic Policy Directives would be protected in civil discovery. *Id.* This was necessary because the privilege recognized by the Court was a qualified one and an adequate record had not been developed below. *Id.* at 2813-14. If, on remand, the district court concluded that the Directives would be afforded protection, then it was also to consider "whether the operative portions of the Domestic Policy Directives can feasibly be segregated from the purely descriptive materials therein, and the latter made subject to disclosure or publication without delay." *Id.* at 2814 (footnote omitted). *See* *EPA v. Mink*, 410 U.S. at 91 (requiring disclosure of factual material segregable from privileged report).

67. Justice Stevens was joined in this dissent by Justice Stewart. 99 S. Ct. at 2814 (Stevens, J., dissenting).

68. *Id.* at 2816 (Stevens, J., dissenting). *See* notes 20 & 21 *supra*.

69. *See* 99 S. Ct. at 2813; notes 61-62 and accompanying text *supra*.

70. 99 S. Ct. at 2815 n.2 (Stevens, J., dissenting). Justice Stevens further noted that the language of the House Report relied on by the majority dealt with the predecisional stage of contractual negotiations, while the FOMC's policy directives reflected the final position and action of the government. *Id.*

FOIA.<sup>71</sup> Justice Stevens also observed that Congress had specifically refused to amend exemption 4 to protect the type of information at issue.<sup>72</sup>

In considering the *Merrill* Court's analysis, it should be noted that in justifying its recognition of a qualified privilege for confidential commercial information under exemption 5, the Court relied substantially on a House Report.<sup>73</sup> It is submitted that the Court's use of this House Report is subject to criticism in two respects. The first of these is the Court's conclusion that Congress did intend to protect the confidentiality of commercial information generated by government agencies in exemption 5.<sup>74</sup> It is submitted that, as noted by the dissent, Congress chose to protect commercial information *solely* in exemption 4 and limited such protection to information obtained from outside the government.<sup>75</sup> It is suggested that by addressing commercial information in exemption 4 and omitting any protection for commercial information *generated by the government*, Congress implicitly rejected such protection.<sup>76</sup>

The majority's second dubious determination based on the House Report is that specific language in the Report actually represents the supposed protection for the confidentiality of the government's commercial information.<sup>77</sup> It is submitted that, as the dissent pointed out, the language at issue actually reflects concern for "predecisional" deliberations, not commercial information generated by the government.<sup>78</sup> While the majority emphasized an isolated phrase in the House Report,<sup>79</sup> it is suggested that a reading of the entire sentence indicates that the reference to information generated before awarding a contract was only one example of various types of ac-

71. *Id.* Justice Stevens noted that the language which the majority had relied upon in the House Report was absent from the Senate Report, which the court had previously recognized to be the more accurate description of congressional intent. *Id.*, citing *Department of the Air Force v. Rose*, 425 U.S. 352, 363-67 (1975).

72. 99 S. Ct. at 2815 n.2 (Stevens, J., dissenting). Justice Stevens stressed that the agency involved in this case had unsuccessfully attempted to convince Congress to provide protection for Domestic Policy Directives in exemption 4. *Id.*, citing H.R. REP. NO. 5012, 89th Cong. 1st Sess. 51, 55, 228, 229 (1965). Justice Stevens felt that the majority's decision served to circumvent this congressional denial. 99 S. Ct. at 2815 n.2 (Stevens, J., dissenting). Finally, Justice Stevens warned that the majority's newly created privilege would impose substantial litigation costs and burdens on future FOIA applicants by requiring proof that disclosure would not harm the government's financial interests. *Id.* at 2816 (Stevens, J., dissenting).

73. 99 S. Ct. at 2811-12. See notes 57-59 and accompanying text *supra*.

74. See notes 58-59 and accompanying text *supra*. Whether the FOMC's commercial interests would be affected by immediate disclosure of the Directives was unclear. Under existing FOMC disclosure procedures, 25 large commercial investors and dealers receive the first indications of FOMC policy through their transactions with the government. 99 S. Ct. at 2805. The dissent questioned whether timely disclosure to the general public would actually result in any harm to the government. *Id.* at 2814 & n.1 (Stevens, J., dissenting).

75. *Id.* at 2814 n.2 (Stevens, J., dissenting). See note 72 and accompanying text *supra*.

76. See note 72 and accompanying text *supra*. For the text of exemption 4, see note 22 *supra*.

77. See notes 57-59 and accompanying text *supra*.

78. 99 S. Ct. at 2815 n.2 (Stevens, J., dissenting).

79. 99 S. Ct. at 2812. See note 57 and accompanying text *supra*.

tivities conducted before an agency makes a decision.<sup>80</sup> It is submitted that the Court improperly superimposed commercial connotations on this isolated "predecisional" phrase.<sup>81</sup> It is further submitted that since the Domestic Policy Directives were final determinations of the FOMC's monthly monetary policy,<sup>82</sup> they were outside the scope of the predecisional privilege and were to be currently published in the *Federal Register*, as required by the affirmative disclosure provisions of the FOIA.<sup>83</sup>

The majority sought to reinforce the propriety of recognizing a *qualified* privilege for commercial information by distinguishing between the purposes for the predecisional privilege and the newly recognized privilege.<sup>84</sup> In so doing, the Court reasoned that although documents protected by the predecisional privilege remain privileged even after the decision is made, documents protected by the privilege for confidential commercial information generated in the process of awarding a contract lose their protection as soon as the contract is awarded.<sup>85</sup> It is submitted that the Court's reasoning fails to explain the relationship between the two privileges where the predecisional communications are of a commercial nature,<sup>86</sup> and creates uncertainty in the law by ignoring past decisions which have applied the predecisional privilege to documents concerning contractual negotiations after the award or denial of a contract.<sup>87</sup>

80. The House Report states: "Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation." H.R. REP. NO. 1497, *supra* note 18, at 10 (emphasis added).

81. See note 80 and accompanying text *supra*.

82. The Domestic Policy Directives do not reflect the give-and-take of the deliberative process which the predecisional privilege is intended to protect; instead, they represent the embodiment of the FOMC's effective policy. See *Federal Open Market Comm. v. Merrill*, 413 F. Supp. at 503-04. See also note 4 *supra*. The FOMC itself agreed in the district court that the Domestic Policy Directives are statements of general policy within the meaning of § 552(a)(1)(D). 413 F. Supp. at 504. For the text of § 552(a)(1)(D), see note 6 *supra*. Indeed, as Justice Stevens noted, the majority in *Merrill* never disagreed with the court of appeal's characterization of the Directives as "statements of general policy." 99 S. Ct. at 2815 (Stevens, J., dissenting).

83. See 99 S. Ct. at 2815 (Stevens, J., dissenting). For the relevant disclosure provision, see note 6 *supra*.

84. 99 S. Ct. at 2812. See note 60 *supra*.

85. 99 S. Ct. at 2812.

86. The Court's reasoning suggests that commercial information would not be privileged after a contract is awarded or an offer is withdrawn, even if the information was predecisional and not relied upon in the final decision. *Id.* It is submitted that such a result would inhibit the full and frank exchange of ideas within an agency which the Court sought to protect in *Mink*. See notes 31-36 and accompanying text *supra*.

87. See, e.g., *Mead Data Cent., Inc. v. United States Dep't of the Air Force*, 575 F.2d 932, 934-35 (D.C. Cir. 1978) (government's cost comparisons, feasibility opinions, and explanatory data prepared in responding to computer system proposal privileged as deliberative even after proposal was rejected); *Washington Research Proj., Inc. v. HEW*, 504 F.2d 238, 250 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (site visit reports prepared by outside consultants for initial evaluation of grant application privileged even after denial of the grant). Cf. *Consumers Union of U.S., Inc. v. Veterans Admin.*, 301 F. Supp. 796 (S.D.N.Y. 1969) (where plaintiff sought records of hearing aid test program used by the government in procurement activity, the court's analysis of the applicability of exemption 5 was in terms of predecisional privilege, with-

It is suggested that another area of the Court's decision subject to criticism is its recognition of a delayed disclosure provision within the FOIA.<sup>88</sup> As forcefully pointed out by the dissent, there is no reference to delayed disclosure in the statute, which provides only for current release or total exemption.<sup>89</sup> The majority failed to provide any statutory justification for its conclusion, apparently believing that the discretionary disclosure provisions of rule 26(c)(7) were fully incorporated into exemption 5.<sup>90</sup>

In considering the impact of *Merrill*, it is suggested that the decision reflects a more liberal treatment of exemption 5 claims than was followed in the earlier *Mink* and *Sears* cases, where the Court's recognition of privileges within exemption 5 was buttressed by *clear* language in the legislative history of the Act.<sup>91</sup> In *Merrill*, however, in the absence of such clear legislative support, the Court was content to focus on the agency's interest in privacy.<sup>92</sup> If such an approach is taken in future cases, it is suggested that even more privileges will be found in exemption 5.

It is also submitted that the Court's holding in *Merrill* may serve as a basis for numerous instances where government agencies refuse to disclose commercial information on the basis of alleged harm to their commercial interests.<sup>93</sup> It is suggested that such claims will force more FOIA applicants into litigation over the extent to which the agencies will be harmed by disclosure, thereby undermining the basic purposes of FOIA.<sup>94</sup> Moreover, it is suggested that the Court's approval of a delay in disclosure poses further obstacles to FOIA applicants. While prior to *Merrill*, the FOIA applicant faced only the alternatives of disclosure or refusal, the Court's approval of a delay in disclosure now presents the possibility of nondisclosure for varying periods of time.<sup>95</sup> Since neither a delay in disclosure nor the scope of any such delay is addressed in the FOIA, it is submitted that the newly recog-

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out reference to any commercial privilege). In exempting the government's commercial information under the predecisional privilege, the *Mead Data* court reasoned as follows:

They [cost comparisons and feasibility opinions] are not raw facts with informational value in their own right, but instead serve primarily to reveal the "evaluative" process by which different members of the decision-making chain arrived at their conclusions — and what those predecisional conclusions are. In addition, the cost comparisons and feasibility opinions are directed at a very specific decision, *i.e.*, whether or not to accept MDC's proposal.

*Id.* at 935 (citations omitted).

88. See note 65 and accompanying text *supra*.

89. See notes 67-68 and accompanying text *supra*.

90. See 99 S. Ct. at 2810.

91. See note 56 and accompanying text *supra*.

92. See notes 64-65 and accompanying text *supra*.

93. Under the *Merrill* holding, federal agencies may deny FOIA requests on the basis of harm to their monetary functions or commercial interests. See 99 S. Ct. at 2816 (Stevens, J., dissenting). For example, procurement decisions or taxing policies may be withheld for supposed commercial reasons.

94. See note 19 and accompanying text *supra*.

95. See notes 88-90 and accompanying text *supra*. The Court found that a delay such as the one provided by the FOMC's regulations might be authorized, depending upon the significance of the harm which would result to the government's monetary or commercial interests. 99 S. Ct. at 1213-14.

nized privilege will require judicial delimitation of appropriate delay for particular types of commercial information and, thus, will impose substantial litigation costs and burdens on future FOIA applicants.<sup>96</sup>

In conclusion, it is submitted that *Merrill* represents a departure from the Supreme Court's previous narrow interpretations of exemption 5 of the FOIA.<sup>97</sup> Although the Court was understandably concerned by the FOMC's claims of serious harm to government interests should the current Directives be disclosed,<sup>98</sup> it is submitted that in the FOIA Congress has specifically defined the "workable balance between the right of the public to know and the need of the government to keep information in confidence,"<sup>99</sup> and that the majority has failed to strictly apply this congressional determination. It is submitted that the Court's decision brings closer to realization an early commentator's observation that exemption 5 could become the most expansive exemption of the FOIA.<sup>100</sup>

*Roman J. Koropey*

96. See note 95 and accompanying text *supra*.

97. See notes 91-92 and accompanying text *supra*. See also Note, *Developments Under the Freedom of Information Act — 1976, 1977* DUKE L.J. 532, 541 (suggesting that the district court opinion in *Merrill* was well-reasoned and a contrary holding would be difficult to justify).

98. See note 65 *supra*.

99. H.R. REP. NO. 1497, *supra* note 18, at 6.

100. See Note, *supra* note 23, at 1048-49.